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No. 03-831

In the Supreme Court of the United States

RANGER CELLULAR AND
MILLER COMMUNICATIONS, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in interpreting 47 U.S.C. 309(*l*) of the 1997 Balanced Budget Act, which required the applicant pool in any upcoming auction to be limited to those with pending applications, the Federal Communications Commission (Commission) reasonably read the statute as applying only to pending applications for broadcast licenses that had previously been awarded through comparative hearings, and not to pending lottery applications for cellular licenses, such as those that petitioners had filed.

2. Whether the Commission reasonably decided that its policy goals and the public interest generally would best be served by holding unrestricted auctions for the cellular licenses at issue in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 333 F.3d 255. The decision of the Federal Communications Commission (Pet. App. 13-75) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2003. A petition for rehearing was denied on September 10, 2003 (Pet. App. 76-77). The petition for a writ of certiorari was filed on December 19, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since the passage of the Federal Communications Act in 1934, the Federal Communications Commission (Commission) has been charged with assigning licenses for use of the electromagnetic spectrum for "the public interest, convenience, or necessity." See, *e.g.*, *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 137-138 (1940). Prior to 1993, the Commission awarded licenses through either a comparative hearing or a lottery. Initially the FCC used comparative hearings, which rated competing applicants under a public interest standard. See 47 U.S.C. 309(a). In 1981, in response to the administrative burden such hearings entailed, Congress authorized the use of lotteries. See *Maxcell Telecom Plus, Inc.* v. *FCC*, 815 F.2d 1551 (D.C. Cir. 1987). Those two methodologies placed very different burdens on both the FCC and the applicants. Applicants in the comparative hearing process had applications to the Commission, and frequently became embroiled in protracted litigation. Pet. App. 3. See *Bechtel* v. *FCC*, 10 F.3d 875 (D.C. Cir. 1993); *Bechtel* v. *FCC*, 957 F.2d 873 (D.C. Cir. 1992). Lottery applicants, by contrast, had to file a simple application and pay a nominal fee. If the winner was disqualified, the Commission held another lottery. Pet. App. 2. Before 1993, the Commission used comparative hearings to award commercial broadcast licenses and used lotteries to award cellular licenses such as those at issue in this case. See *id.* at 2-3.

2. In 1993 Congress enacted 47 U.S.C. 309(j) (1994), as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 387. That provision authorized the FCC to award spectrum licenses by competitive bidding. If the service that was

the subject of the award was of a type for which auctions could be used under statutory criteria, Section 309(j) provided that "[t]he [FCC] shall not issue any license or permit [by lottery] after the date of enactment of this Act unless * * * one or more applications for such license were accepted for filing by the Commission before July 26, 1993." § 6002(e) and (e)(2), 107 Stat. 397. The Commission thus had discretion to decide whether to use auctions or continue to use lotteries to assign licenses for which applications were on file prior to July 26, 1993. Because the initial lottery winner had been disqualified in a number of instances, a few cellular licenses fell into the category of licenses for which applications were on file prior to July 26, 1993, including several for which petitioners had filed applications in 1988 and 1989.

3. Congress enacted the statutory provision primarily at issue in this case—47 U.S.C. 309(*l*)—in the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a), 111 Stat. 258-260. At that time the FCC was still considering whether to use lotteries or auctions to award the few cellular licenses that had not yet been awarded. See *In re Certain Cellular Rural Serv. Area Applications*, 17 F.C.C.R. 8508, 8509-8510 (2002). The 1997 Act resolved that issue by generally directing the Commission to use auctions. It repealed the prior provision that had granted the Commission discretion to proceed either by auction or lottery, and replaced those provisions with the present Section 309(j)(1) and (2), 47 U.S.C. 309(j)(1) and (2), which require the Commission to assign all licenses by auction, apart from exemptions recognized in Section 309(j)(2) that are not relevant here. Following the passage of the 1997 Act, cellular licenses could therefore no longer be awarded by lottery.

The section heading of the new Section 309(*l*), which, as the court of appeals noted (Pet. App. 8), was a part of the Act itself and not added by the Reviser, stated that it was to apply to "pending comparative licensing cases." Section 309 (*l*) provides:

> With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall—(1) have the authority to [conduct auctions]; and (2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding.

47 U.S.C. 309(*l*). The provision therefore identifies a class of cases—those involving "competing applications for initial licenses or construction permits for commercial radio or television stations" in which applications had been filed before July 1, 1997. In those cases, the Commission could, but was not required to, choose to conduct auctions, and any such auctions had to be limited to the existing applicants.

4. The Commission issued a Notice of Proposed Rulemaking proposing to hold unrestricted auctions for the cellular licenses (dubbed "RSA" licenses, for Rural Service Area) at issue in this case. *In re Implementation of Competitive Bidding Rules to Licensing Certain Rural Serv. Areas, Notice of Proposed Rulemaking*, 16 F.C.C.R. 4296 (2001). After reviewing comments, the Commission issued the order under review, in which it decided to hold open—not restricted—auctions. See Pet. App. 13-62.

The Commission concluded that "it is in the public interest to allow all entities * * * to participate in the RSA auction." Pet. App. 27-28. The Commission noted

that it "has generally favored open eligibility because [it] believe[s] that maximizing the pool of auction applicants helps to ensure that licenses are awarded to entities that value them most highly and are, therefore, most likely to offer prompt service to the public." *Id.* at 28. In the Commission's view, that approach "best fulfills the public interest objectives set forth in Section 309(j)(3) of the Communications Act." *Ibid.* The Commission also concluded that there are not "compelling reasons to exclude potential participants in the upcoming * * * auction." *Id.* at 28-29. See *id.* at 32 ("[A] policy of unrestricted eligibility in the RSA auction will best fulfill our public interest goals."); *id.* at 33 (finding that open eligibility will best serve statutory goal of "enourag[ing] the rapid deployment of services specifically to rural areas").

The Commission rejected petitioners' "statutory and equitable arguments against open eligibility." Pet. App. 35. In particular, the Commission rejected petitioners' claim that Section 309(*l*) by its terms restricts eligibility for the auctions at issue in this case to lottery applicants whose applications were on file before July 1997. *Ibid.* The Commission explained that Section 309(*l*) is limited to licenses for "commercial radio and television stations," a phrase that "clearly refers to broadcast facilities." *Id.* at 36-37. The Commission noted that "[w]here Congress has referred to wireless services like cellular in other provisions of the Communications Act, * * * it has clearly used the term 'commercial mobile service.'" *Id.* at 37-38 (citing 47 U.S.C. 253(e), 274(i)(2)(B), 333(c)(1) and (d)(2)). The Commission also drew support from the Conference Report on Section 309(*l*), which specifically referred to the provision's applicability "to resolve any mutually exclusive applications for *radio or television broad-*

cast licenses that were filed with the Commission prior to July 1, 1997." Pet. App. 38 (emphasis in FCC Order) (citing H.R. Conf. Rep. No. 217, 105th Cong., 1st Sess. 573 (1997)). On those bases, the Commission rejected petitioners' argument that Section 309(*l*) had to be read to require the auctions for the cellular licenses at issue here to be limited to those whose applications were pending on July 1, 1997.

The Commission also rejected petitioners' "equitable arguments that [petitioners] contend support artificially limiting eligibility." Pet. App. 39. The Commission found that petitioners "fail to show how the public interest would be served by limiting the RSA auction to only three former lottery applicants." *Id.* at 40; see *id.* at 35 n.51 (noting that petitioners and at most one other applicant would be the only auction participants under petitioners' theory). The Commission rejected petitioners' arguments that opening up the auction would delay the licensing in litigation, noting that "the Commission necessarily is guided by the public interest objectives set forth in Section 309(j)(3)(A)-(D) in setting application eligibility and not by concerns over the prospects of litigation and appeals." *Id.* at 41. The Commission also noted that petitioners' arguments "totally disregard the equities of other parties potentially interested in seeking the subject authorizations, as well as equitable considerations relevant to the public interest." *Ibid.* The Commission found that open eligibility would have "a greater probability than limited eligibility of resulting in the rapid deployment of new technologies and services to the public, the possibility of competition and economic opportunity, and the efficient and intensive use of the spectrum." *Id.* at 41-42.

5. On petition for review, the court of appeals upheld the Commission's decision. Pet. App. 1-12. The court noted that petitioners had "offer[ed] several non-frivolous arguments that § 309(*l*) must be read to apply to licenses to provide cellular telephone service." *Id.* at 7. But, the court held, petitioners' "arguments do not demonstrate that § 309(*l*) simply must be read as applying to cellular telephone licenses." *Ibid.* The court acknowledged that the phrase "'commercial radio and telephone licenses' is not defined, nor is it used, in the 1997 Act outside the provision adding § 309(*l*) to the Communications Act." *Ibid.* The court also noted, however, that a similar phrase—"commercial radio"—"had been used * * * in both the Communications Act and the regulations promulgated thereunder, to mean only broadcast radio." *Ibid.* The court also observed that the heading of Section 309(*l*), which refers to "pending comparative licensing cases," supported the FCC's conclusion. *Id.* at 8. While "as of 1997 broadcast licenses had for more than 50 years been awarded through comparative hearings," cellular telephone licenses had "not been the subject of comparative hearings since at least 1986." *Ibid.* Finally, the court found that the Conference Committee Report cited by the Commission "clearly implies that the Congress intended to limit the scope of § 309(*l*) to broadcast licenses." *Ibid.*

Based on those observations, the court concluded "that the Congress has not directly spoken to the question whether § 309(*l*) covers only broadcast stations." Pet. App. 8. The court found that, "for the same reasons the Commission's arguments cast doubt upon the clarity of § 309(*l*), the agency offers a reasonable interpretation of the statute." *Id.* at 8-9. The court concluded that "[a]lthough [the Com-

mission's] reading is not the only possible interpretation of § 309(*l*), it is certainly a reasonable one and therefore commands our deference." *Id.* at 9.

The court also rejected petitioners' argument that the FCC had failed to follow its own precedents in determining to open the auction to newcomers. The court found that "the Commission reasonably applied appropriate factors to the circumstances of this case," including the benefits of granting licenses through auctions to those who "value them most highly and are, therefore, most likely to offer prompt service to the public." Pet. App. 9. The court also found that the Commission had acted reasonably in relying on its "special responsibility * * * to promote the rapid development of service" in rural areas covered by the licenses at issue. *Id.* at 10. The court found that the Commission's past decisions on which petitioners relied were all distinguishable. *Ibid.*

ARGUMENT

The decision of the court of appeals was correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, this case does not present a question of exceptional importance, but only two narrow questions that lack ongoing significance: the proper interpretation of a statutory provision that applied to a small class of then-pending FCC licensing cases; and the reasonableness of the FCC's exercise of its discretion in declining to limit the applicant pool in auctions for cellular licenses in the unique circumstances of this case. Neither question is likely to arise again in the future. Further review is unwarranted.

1. Contrary to petitioners' apparent suggestion (Pet. 9) that this case could apply to "thousands of applicants" whose applications were pending in 1997, the

question presented in this case involves only the fact-specific application of a particular federal statute and would likely affect only the two petitioners in this case. Section 309(*l*) itself served the function of protecting a limited class of broadcast applicants whose comparative hearing cases were still pending in 1997, during the last stage of the Commission's congressionally directed transition to auctions. As a transition rule, Section 309(*l*) applied by its terms only to licenses for which "competing applications * * * were filed with the Commission before July 1, 1997." 47 U.S.C. 309(*l*). Section 309(*l*) will have no further application to future auctions.

Even with respect to the class of applicants with applications pending on July 1, 1997, petitioners' claim will likely affect only petitioners, because it appears that petitioners are the only parties that could now be affected by a ruling on the meaning of Section 309(*l*). In keeping with its established practice and precedent, the Commission dismissed the cellular applications that had been pending on July 1, 1997 (without prejudice to re-file to participate in an auction) before proceeding to hold open auctions. See *Bachow Communications, Inc.* v. *FCC*, 237 F.3d 683, 686-688 (D.C. Cir. 2001). No applicants other than petitioners preserved an objection to those dismissals.[1] Accordingly, even if peti-

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[1] Petitioners did challenge the dismissals in another case, but the court of appeals has now ruled against them. See *Ranger Cellular & Miller Communications, Inc.* v. *FCC*, 348 F.3d 1044, 1050 n.5 (D.C. Cir. 2003). That case involved *four licenses, in addition to the four licenses at issue in this case.* See *id.* at 1047. Although the Commission noted that the auctions in this case potentially involved one additional applicant named High Tower Communications, see Pet. App. 35 n.51, that applicant neither pre-

tioners were ultimately to prevail on their claims in this case and the Commission were required to hold new auctions limited to applications pending on July 1, 1997, petitioners would be the only parties who, because they have preserved their objections to the dismissals, could participate. Thus, any decision by the Court in this case would affect only petitioners and would have no bearing on any other pending or potential case involving the applicability of Section 309(*l*).

2. Petitioners argue (Pet. 10) that the court of appeals erred when it "found [Section 309(*l*)] ambiguous and on that basis deferred to the FCC's interpretation of the statute," because, in petitioners' view, "the FCC itself had found that the statute was *not* ambiguous and therefore had not gone through the process of expert statutory interpretation which *Chevron* Step II contemplates." See Pet. 18-21. Petitioners refer to the second step of the analysis set forth in *Chevron U.S.A. Inc.* v. *Natural Resource Defense Council, Inc.*, 467 U.S. 837, 843 (1984), in which, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

a. Further review of that issue is not warranted because it was neither pressed nor passed on below. See *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Petitioners did not argue to the court of appeals that the FCC's interpretation was not entitled to *Chevron* deference because the Commission had "not gone through the process of expert statutory interpretation." Pet. 10. To the contrary, petitioners con-

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served its objections by arguing against the dismissal in the above case nor participated in petitioners' petition for review in this case.

ceded that the FCC had engaged in statutory construction, see, *e.g.*, Pet. C.A. Br. 11 ("The FCC has *chosen to interpret* the statutory protection accorded by Congress to pre-1997 filers as applicable only to broadcast applicants.") (emphasis added), and argued that the FCC's interpretation was not a reasonable one, see *id.* at 19-20.[2] Nor did the court of appeals address any argument that the FCC's interpretation was not entitled to deference because the FCC did not actually arrive at its own interpretation of the statute.

b. In any event, petitioners' "novel" (Pet. App. 10) claim is mistaken, because the FCC made quite clear that, insofar as Section 309(*l*) left any room for interpretation, it should be understood to permit open public auctions for the cellular licenses at issue in this case. The Commission began its discussion by noting that it had in recent years "generally favored open eligibility" because "maximizing the pool of auction applicants helps to ensure that licenses are awarded to entities that value them most highly and are, therefore, most likely to offer prompt service to the public." *Id.* at 28. The Commission explained repeatedly that open

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[2] In their reply brief, petitioners did state that "[b]efore the [court of appeals] the FCC argues for the first time that the statute is ambiguous, and therefore the Commission is entitled to *Chevron* deference for its interpretation," and they commented that the FCC's Order "said that the statute was plain on its face." Pet. C.A. Reply Br. 12 (footnote omitted). A party may not raise new arguments in a reply brief. In any event, even in their reply brief, petitioners did not suggest that this case presented the issue they now raise—the proper disposition of a case in which an agency could have engaged in its own process of statutory interpretation that would have received *Chevron* deference, but did not do so. Nor did petitioners at any point suggest that a remand to the Commission might be an appropriate disposition of the case.

eligibility thus "best fulfills the public interest objectives set forth in Section 309(j)(3) of the Communications Act." *Ibid.* See *id.* at 32-33. The Commission also noted that it had a special statutory responsibility under 47 U.S.C. 309(j)(4)(B) "to encourage the rapid deployment of services specifically to rural areas," and that awarding the RSA licenses at issue here through an open auction "will encourage participation in the RSA auction by entities that are most likely to be interested in, and capable of, serving rural areas." Pet. App. 33. The Commission also found that petitioners' "equitable arguments against open eligibility" were not persuasive. *Id.* at 35; see *id.* at 39-42.

The Commission was therefore quite explicit that, as a matter of policy, it believed that open eligibility would best serve the statutory goals. To be sure, the Commission also believed that its construction of Section 309(*l*) was consistent with Congress's intent in enacting Section 309(*l*). The Commission concluded that, when examined in light of the Communications Act as a whole and the legislative history of Section 309(*l*), the crucial coverage phrase—"commercial radio and television stations"—"clearly refers to broadcast facilities," rather than the cellular facilities at issue in this case. Pet. App. 36-37. But that simply shows that the Commission concluded that Congress's intent was entirely in accord with the Commission's own preferred interpretation. It does not show that the Commission in some way failed to engage in precisely the process of statutory interpretation contemplated by *Chevron* and to which a court must defer. This case therefore does not present any question regarding the applicability of the *Chevron* rule to a situation in which an agency has followed an interpretation of a statute that it mistakenly believes is required, even though, if the agency

had known that the statute were ambiguous, the agency would perhaps have adopted another course.

3. Petitioners also argue (Pet. 10-18) that the court of appeals erred in holding that Section 309(*l*) was open to the interpretation adopted by the Commission, under which the Commission had authority to hold open auctions for the cellular licenses at issue here. The court recognized that petitioners advanced "non-frivolous" arguments for construing the phrase "commercial radio or television stations" in Section 309(*l*) as applicable to cellular licenses, as well as broadcast licenses. Pet. App. 7. Ultimately, however, petitioners' arguments prove at most that the phrase is ambiguous and subject to interpretation. In that situation, as the court of appeals correctly found, the Commission's interpretation of Section 309(*l*) is entitled to *Chevron* deference and is controlling.

The court of appeals noted several reasons why the Commission's interpretation of Section 309(*l*) to refer solely to auctions for broadcast licenses was reasonable. The phrase "commercial radio or television stations" in Section 309(*l*) should be construed in light of Congress's use of the similar phrase "commercial radio" in the Communications Act and the FCC's use of that phrase in its own regulations to refer only to broadcast entities. See Pet. App. 7-8, 37-38. Moreover, as the court of appeals explained, the heading of Section 309(*l*) supports that interpretation, because its reference to "pending comparative licensing cases" must be understood to refer only to broadcast licensing cases, since those were the only licensing cases under the comparative hearing regime pending when Section 309(*l*) was enacted. See *id.* at 8; see also *INS* v. *National Ctr. for Immigrants' Rights*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving

an ambiguity in the legislation's text."). Finally, the legislative history supports the same interpretation, because the Conference Committee Report refers to Section 309(*l*) as applicable to "radio or television *broadcast* licenses" and makes no reference to any broader application to cellular licenses. See Pet. App. 8.

For those reasons, the court of appeals correctly held that the Commission's interpretation of Section 309(*l*) was controlling under *Chevron*. In any event, further review would not be warranted to determine whether the court of appeals correctly upheld as reasonable the Commission's interpretation of Section 309(*l*)—a statute that contains a limited-time transition rule and that will have no further general application in the future.

4. Notwithstanding its decision that Section 309(*l*) did not *require* limiting the eligibility pool for cellular auctions, the FCC nonetheless had discretion to restrict its cellular auctions as a matter of policy if it decided that doing so would be appropriate. Petitioners argue (Pet. 21) that the Commission's decision to employ an open auction here was "a major deviation from established agency policy" that was not adequately explained by the Commission. There was no deviation in this case from any "established policy," however, and the court of appeals correctly held that "[t]he Commission has * * * properly distinguished its precedents." Pet. App. 10. In any event, further review of the court of appeals' case-specific conclusion that the FCC "considered the relevant factors and did not act in an arbitrary and capricious manner in applying the public interest standard" in this case would not be warranted. *Ibid.*

The Commission has always looked to equitable factors and the public interest in determining whether to limit eligibility for auctions. As the FCC explained,

however, "[i]n recent years, the Commission has generally favored open eligibility" because it best "ensure[s] that licenses are awarded to entities that * * * are most likely to offer prompt service to the public." Pet. App. 28. The Commission reasoned that "adopting open eligibility" would more likely result "in the rapid deployment of new technologies and services to the public, the possibility of competition and economic opportunity, and the efficient and intensive use of the spectrum." *Id.* at 41-42. The Commission applied that established policy favoring open eligibility here.

In addition, the Commission referred to other factors that supported open eligibility in the particular circumstances here. The Commission noted that cellular operators had been granted interim operating authority to provide service in the areas at issue in this case. Pet. App. 27 & n.29. As the court of appeals recognized, the fact that service was being provided on an interim basis made it feasible to reopen the application process, even though that could result in some delay in ultimate award of the licenses. *Id.* at 10. The Commission also referred to the fact that "nearly twelve years have passed since the closing of the original RSA filing window," so that many parties now interested in participating in the auction "would not have had the opportunity to file applications, while some applicants that did file lottery applications may no longer exist." *Id.* at 26-27; see *id.* at 42 ("[T]here may be parties interested in providing cellular service in these markets, and qualified to do so, that did not even exist at the time the lottery applications were filed."). The Commission acted reasonably in deciding that open eligi-

bility was warranted on the circumstances present in this case.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Petitioners err in contending (Pet. 24) that the court of appeals improperly relied on a "*post hoc* justification" proffered by agency counsel as the basis for distinguishing prior Commission precedent. Some of the precedents cited by petitioners did not involve open eligibility at all. See Pet. App. 10, 39 n.61. Beyond that, the Commission made clear that its decision in this case depended in part on a balancing of the particular equitable factors present here. See *id.* at 39-42. The Commission's order expressly noted that customers in the affected areas were already receiving service, see *id.* at 27 n.29, rejected petitioners' arguments that the "delay" caused by open eligibility provided a reason not to adopt that approach, *id.* at 41, and determined that open eligibility would, in the circumstances of this case, more likely "result[] in the rapid deployment of new technologies and services to the public," *ibid.* Based on those considerations, the court of appeals relied on the Commission's own findings and reasoning—not a "*post hoc* justification"—in concluding (*id.* at 10) that the Commission had "properly distinguished its precedents" cited by petitioners.